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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

13 MICHAEL LAVIGNE, *et al.*,
14 Plaintiffs,
15 vs.
16 HERBALIFE LTD., *et al.*,
17 Defendants.

CASE NO. 2:18-cv-07480-JAK (MRWx)
[Related Case 2:13-cv-02488-BRO-RZ]
**HERBALIFE'S REPLY IN SUPPORT
OF MOTION TO DISMISS
AMENDED COMPLAINT**
Date: February 10, 2020
Time: 8:30 A.M.
Crtrm.: 10B
Assigned to Hon. John A. Kronstadt

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1 I. INTRODUCTION

2 Plaintiffs' response boils down to the argument that their elimination of two
 3 of three Herbalife corporate defendants is a cure-all. It is not. The original
 4 complaint violated Rule 9(b) because it did not differentiate between the actions of
 5 the corporate Herbalife defendants and multiple individual defendants. The
 6 Amended Complaint reduces the corporate defendants to one—but still fails to
 7 distinguish the actions supposedly undertaken by Herbalife from the actions of
 8 dozens of (now dismissed) individual distributors. This basic pleading defect is
 9 fatal to Plaintiffs' claims.

10 The Amended Complaint's new allegations compound the problem by
 11 expanding the universe of individual distributors from 44 individually-named
 12 defendants to an unidentified group of an estimated 100 event speakers (the
 13 so-called "Featured Speakers"). All of these largely unnamed speakers supposedly
 14 failed to disclose at events the alleged illegitimate methods by which they achieved
 15 success. But there are no specific allegations that connect Herbalife to these
 16 unidentified event speakers, let alone the purported fraudulent scheme. There are no
 17 specific allegations that define the scope of the underlying fraud, *i.e.*, the names of
 18 the Featured Speakers who achieved success through the use of "banned" methods,
 19 the methods they purportedly used, the events at which they failed to disclose their
 20 use of such methods, or how Herbalife is alleged to have known of their omissions.

21 As such, Plaintiffs' RICO claims still fail to plead the predicate fraud with
 22 particularity. The new allegations about Herbalife's use of the mail and wires are
 23 inconsequential—because there is no allegation that demonstrates those actions
 24 were taken *in furtherance of* the purported fraudulent scheme. Herbalife's
 25 advertisement of a given event does not establish that Herbalife knew the speaker(s)
 26 at that event intended to engage in relevant misconduct beforehand, yet still
 27 promoted their appearances. Plaintiffs' RICO claims also fail to meet the proximate
 28 causation requirement. Plaintiffs themselves allege in the Amended Complaint that

1 they spent money on events as an investment in their own Herbalife businesses.
 2 Their alleged “event” losses therefore cannot be viewed in a vacuum separate and
 3 apart from their net business losses (or gains). The innumerable factors that go into
 4 the successful pursuit of a business—particularly a multi-level marketing business
 5 that involves both the sale of product and potential recruitment of others to do the
 6 same—would make it impossible for a factfinder to ascertain which portion of
 7 Plaintiffs’ net losses are attributable to Herbalife’s promotion of events.

8 Plaintiffs’ state law claims, which are premised on the same underlying fraud,
 9 fail to meet Rule 9(b)’s heightened pleading requirement for these and additional
 10 reasons. As to the negligent misrepresentation claim, Plaintiffs still cannot point to
 11 actionable representations *made by Herbalife* on which they relied. As to the Unfair
 12 Competition Law (“UCL”) claim, Plaintiffs’ recitation of statements allegedly made
 13 by some of the Featured Speakers does not suffice for specific allegations against
 14 Herbalife.

15 After over two years of litigation, and despite nearing the end of discovery,
 16 Plaintiffs still cannot plead any viable claims against Herbalife. Any amendment
 17 would be futile. The Amended Complaint should be dismissed with prejudice.

18 **II. ARGUMENT**

19 **A. Plaintiffs Fail to Cure the Defects Identified in the Court’s
 20 Dismissal Order.**

21 Plaintiffs did not heed the Court’s warning in its order dismissing the original
 22 complaint that “[a]ctions that could be attributed to one or more of the Herbalife
 23 Defendants are alleged *as to either or all defendants, inclusive of those claims
 24 against those Individual Defendants that were not transferred to this
 25 District . . .*” Dkt. 196 (“Order”) at 10 (emphasis added). In other words, the
 26 Court observed that not only did the original complaint impermissibly lump together
 27 the Herbalife defendants, but it also *blurred any distinction between the alleged
 28 roles of Herbalife and the former individual defendants*. Plaintiffs’ Amended

1 Complaint does not cure this pervasive problem. Indeed, it does not even address
 2 the specific allegations that the Court found problematic. Dkt. 208 (“Mtn.”) at 9-10
 3 (quoting Dkt. 202 at ¶¶ 76, 120-122) (alleging, for example, that “*Herbalife and its*
 4 *Featured Speakers* expect and encourage their . . . promotional messages to be
 5 remixed and echoed across the wires” and that a “*web of entities*” own and control
 6 distributor-run events) (emphasis added). These underlying pleading deficiencies
 7 doom both the RICO and state law claims.

8 **B. Plaintiffs’ RICO Claims Fail.**

9 **1. The Mail and Wire Fraud Predicate Acts Are Not Pled with
 10 Specificity.**

11 Plaintiffs fundamentally misapprehend what is required of them under
 12 Rule 9(b). They must plead with specificity Herbalife’s use of the mail or wires “*in*
 13 *furtherance of the [alleged] scheme*,” or put another way, Herbalife’s “role” in the
 14 scheme. *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1400
 15 (9th Cir. 1986) (emphasis added);¹ *Swartz v. KPMG LLP*, 476 F.3d 756, 765 (9th
 16 Cir. 2007). Under the Amended Complaint, the alleged fraud is that some event
 17 speakers failed to disclose the true means by which they achieved success. Dkt. 219
 18 (“Opp.”) at 14 (“The Amended Complaint plainly alleges a scheme by which
 19 Herbalife uses its Featured Speakers to sell a dream, while Herbalife knows that the
 20 methods these individuals purport to teach have no relationship to the success these
 21 Featured Speakers allegedly attained.”).² It is Herbalife’s purported role in that
 22 fraud that must be pled with specificity. Merely eliminating two of the corporate
 23 defendants falls short of this requirement.

24
 25 ¹ Unless otherwise noted, internal citations and quotation marks have been
 omitted.

26 ² By way of example, Plaintiffs do not contend that an income testimonial made at
 27 an event (“I made \$X pursuing the business opportunity”) is misleading because the
 amount is wrong. Rather, they assert that such testimonials are misleading because
 28 the speakers achieved success through illegitimate means, not by attending events.

a. Plaintiffs Do Not Specifically Plead the Underlying Fraud.

3 Plaintiffs assert that they need only allege “that the Featured Speakers said
4 something fraudulent.” Opp. at 5. At the very least, that “something” must be pled
5 with particularity—it is not. Rather, Plaintiffs ask the Court and Herbalife to
6 presume that each of the estimated 100 Featured Speakers (over twice the number of
7 former individual defendants)³ achieved success through “banned” methods and
8 made representations to the contrary at each event at which they spoke since 2009.
9 Such conclusory allegations cannot form the basis for a RICO claim. *See Semegen*
10 *v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985) (“Rule 9(b) ensures that allegations of
11 fraud are specific enough to give defendants notice of the particular misconduct
12 which is alleged to constitute the fraud charged so that they can defend against the
13 charge and not just deny that they have done anything wrong.”).

14 Although the Court observed that the original complaint specifically alleged
15 false statements made by some of the individual defendants regarding event
16 attendance, those statements, under the Amended Complaint, are only fraudulent if
17 the individuals who made them (a) achieved success through illegitimate methods
18 and (b) did not disclose their use of such methods at events. Neither of these
19 predicate allegations is pled with particularity. The Amended Complaint only
20 alleges that *two* out of the estimated 100 Featured Speakers engaged in certain
21 “banned” practices, and even these allegations are deficient. Dkt. 202 at ¶¶ 36, 47.⁴

22 The Amended Complaint does not contain any specific allegations that the
23 other estimated 98 Featured Speakers engaged in relevant misconduct. *See, e.g., id.*
24 at ¶¶ 28, 31-33, 42 (alleging that “many,” “some,” or “certain” Featured Speakers

²⁶ ³ Nor are all of these 100 speakers identified. By Herbalife's count, only about 60 or so speakers' names are prefaced with the label of "Featured Speaker."

27 ⁴ As to John Tartol, there is no allegation that he achieved success through
28 illegitimate means. *Id.* at ¶ 36. As to Michael Burton, there is no allegation that his
bankruptcy had anything to do with his Herbalife business. *Id.* at ¶ 47.

1 relied on “banned” methods), ¶ 40 (speculating that “high volume cross-border
2 transactions present[] the opportunity” for money laundering). Without knowing
3 which Featured Speakers are alleged to have done what, Herbalife cannot
4 meaningfully defend against Plaintiffs’ RICO claims.

b. Plaintiffs Do Not Sufficiently Allege Herbalife's Participation in the Featured Speakers' Purported Fraud.

8 Plaintiffs merely point to a handful of benign actions on the part of Herbalife,
9 like its (1) posting of fliers that certain “distributors and aspirants” then
10 “***republished in increasingly fraudulent form;***” (2) sale of tickets to corporate
11 events; (3) distribution of event curricula and agendas; and (4) sponsoring of pre-
12 event calls. Opp. at 6-7. Critically, Plaintiffs do not allege that any of this conduct
13 by itself is fraudulent. Instead, they fall back on the uncontroversial proposition that
14 the innocent use of the mail and wires can form the basis for a RICO claim. That
15 misses the point. Plaintiffs do not plead with specificity how these alleged, non-
16 tortious acts on the part of Herbalife were “in furtherance” of the alleged non-
17 disclosure scheme.⁵ *Schreiber*, 806 F.2d at 1400. Herbalife’s circulation of an
18 innocuous event agenda, for example, does not establish that it knew an individual
19 who was slated to speak at that event achieved success through illegitimate means
20 and nevertheless promoted that speaker (let alone that it did for 100 different
21 speakers at thousands of events over a ten-year time period). Plaintiffs admit as
22 much, acknowledging that Herbalife’s “statements are ***independent*** of the dozens of
23 additional allegations regarding fraudulent representations made by Featured
24 Speakers.” Opp. at 7 (emphasis added). Plaintiffs do not plead with specificity the

⁵ Plaintiffs conflate RICO’s “distinct enterprise” element with the requirement that the predicate acts of mail and wire fraud be pled with particularity. Opp. at 8. It is Herbalife’s role in the Featured Speakers’ alleged fraud that is not adequately pled.

1 supposed link between Herbalife’s “independent” acts and the fraud allegedly
 2 perpetrated by event speakers.⁶

3 The only allegations purportedly connecting Herbalife to the Featured
 4 Speakers’ alleged fraud do not satisfy Rule 9(b)’s heightened pleading standard.
 5 *See* Dkt. 202 at ¶¶ 2, 21, 22, 27 (merely alleging that Herbalife “encourages”
 6 Featured Speakers to “promote the events;” has “actual knowledge” that the event-
 7 related claims made by the Featured Speakers are false; and “promotes a steady
 8 stream of” such speakers and “parade[s]” them “around the country.”); *see Swartz*,
 9 476 F.3d at 765 (finding that such allegations do not meet Rule 9(b)).⁷

10 Plaintiffs’ reference to statements allegedly made by Herbalife in 2011 and
 11 2012 are unavailing. Opp. at 8-9. Plaintiffs do not respond to Herbalife’s argument
 12 that such statements should be disregarded because they pre-date the relevant period
 13 under the applicable statutes of limitations. Mtn. at 11 n.5. The allegation that
 14 Herbalife circulated a presentation in April 2013 (which also pre-dates the relevant
 15 statutory period) stating only that “my ability to grow a royalty check is completely
 16 dependent on my ability *to get people to events*” is irrelevant. Opp. at 9; Dkt. 202 at
 17 ¶ 59 (emphasis added). The alleged fraud is not that Plaintiffs were duped into
 18 *inviting others to attend events*—Plaintiffs do not allege they suffered any monetary
 19 losses in doing so—but rather that they were misled into attending events
 20 themselves. Opp. at 9.⁸

21

22 ⁶ Plaintiffs’ admission that Herbalife has a policy designed to prevent
 23 misrepresentations at events further attenuates any purported link between
 24 Herbalife’s conduct and the underlying fraud. If Herbalife’s alleged sin here is a
 25 failure to “uniformly enforce[]” its policy (Opp. at 10), that surely cannot form the
 26 basis for a RICO claim, which requires a “specific intent to deceive or defraud.”
 27 *Schreiber*, 806 F.2d at 1400.

28 ⁷ Plaintiffs’ attempt to distinguish *Swartz* falls flat. None of the additional
 29 allegations in the Amended Complaint address with specificity Herbalife’s role in
 30 the alleged fraud.

31 ⁸ Plaintiffs also do not dispute that the other new statements allegedly made by

c. Plaintiffs Do Not Allege a Duty to Disclose.

Under the Amended Complaint, Plaintiffs' RICO claim is predicated on an alleged failure to disclose the means by which the Featured Speakers' attained success. *See, e.g.*, Dkts. 202, 202-1 (redline comparison of the two complaints) at ¶¶ 27, 30, 32, 34, ¶ 37 ("Yet while promoting these individuals, Herbalife never discloses the true source of their so-called 'success' within the business"); ¶ 38 (alleging the same), ¶ 41 (alleging an "undisclosed currency arbitrage scheme"), ¶ 43 ("The existence of this method of operation was never disclosed . . ."); ¶ 45 ("[N]or does Herbalife disclose that the very methods that these Featured Speakers used to attain their standing in the Herbalife business are currently banned.").

11 Plaintiffs' response—that they plead with specificity actions Herbalife took
12 through the mail and wires—is a non-sequitur. Because their RICO claims are
13 premised on an alleged non-disclosure, Plaintiffs must allege a corresponding duty
14 to disclose. *Eller v. EquiTrust Life Ins. Co.*, 778 F.3d 1089, 1092 (9th Cir. 2015)
15 (“Absent an independent duty, such as a fiduciary duty or an explicit statutory duty,
16 failure to disclose cannot be the basis of a [RICO] fraudulent scheme.”). Plaintiffs’
17 admitted failure to do so requires dismissal of their RICO claims.

2. Plaintiffs Cannot Meet RICO's Proximate Causation Requirement.

a. There Are No Predicate Offenses Alleged Against Herbalife That Proximately Caused Plaintiffs' Losses.

22 It is not enough under RICO for Plaintiffs to allege that they would not have
23 attended events had “Herbalife told the truth” regarding the “correlation between
24 financial success and event attendance.” Opp. at 13. That is merely another way of
25 saying that Herbalife’s conduct was a “but for” cause of Plaintiffs’ decisions to
26 attend events. *See Hemi Grp., LLC v. City of New York, N.Y.*, 559 U.S. 1, 9 (2010)

28 Herbalife, like “Sharpen your skills,” “Ignite Your Business,” and “learn to build a more successful business,” are puffery. Mtn. at 10.

1 (“[T]he plaintiff is required to show that a RICO predicate offense not only was a
2 ‘but for’ cause of his injury, but was the proximate cause as well.”).

3 Further, the Amended Complaint does not establish that the alleged predicate
4 offenses of mail and wire fraud proximately caused Plaintiffs’ losses. *Id.* The only
5 predicate acts alleged against Herbalife concern its benign promotion of events
6 through various media. There are no specifically pled predicate acts, however, that
7 tie Herbalife to the Featured Speakers’ alleged non-disclosures. Thus, Plaintiffs’
8 reliance on *Takeda* is misplaced. Opp. at 13. Unlike in *Takeda*, where the plaintiffs
9 alleged that a drug manufacturer had “learn[ed] through multiple studies” that the
10 drug at issue increased the risk of bladder cancer, here, there is no specifically
11 alleged predicate act demonstrating that Herbalife knew that even a single Featured
12 Speaker achieved success through illegitimate means or that it later promoted any
13 speakers alleged to have done so. *Painters & Allied Trades Dist. Council 82 Health*
14 *Care Fund v. Takeda Pharm. Co. Ltd.*, 943 F.3d 1243, 1246 (9th Cir. 2019).

15 **b. Trump Requires Dismissal of Plaintiffs’ RICO Claims.**

16 Because Plaintiffs attended events in order to pursue a business—a business
17 at which they claim they ultimately failed—their attendance cannot be hermetically
18 sealed from other factors that may have contributed to their lack of success, like, for
19 example, their sales skills, the size of their networks, local demand for Herbalife
20 product, representations made by third parties outside of events, the extent to which
21 they followed advice given at events, and other aspects of the business opportunity
22 purportedly not at issue in this case.⁹ *Doe v. Trump Corp.*, 385 F. Supp. 3d 280
23 (S.D.N.Y. 2019).¹⁰ If instead it is Plaintiffs’ contention that there are no
24

25 ⁹ Plaintiffs attack by proxy the viability of the business opportunity. Events are
26 only valueless, Plaintiffs contend, because those who tout their value did not
27 “buil[d] a significant income by retailing Herbalife’s products according to
Herbalife’s rules.” Dkt. 202 at ¶ 21.

28 ¹⁰ Plaintiffs are wrong to imply that the Court previously rejected these arguments.

1 circumstances under which they could have successfully pursued the Herbalife
2 business opportunity, then there is no meaningful way for a trier of fact to “ascertain
3 the amount of [Plaintiffs’] damages attributable to” Herbalife’s event-related
4 conduct alone. *Ass’n of Washington Pub. Hosp. Districts v. Philip Morris Inc.*, 241
5 F.3d 696, 701 (9th Cir. 2001). Either way, Plaintiffs cannot meet RICO’s stringent
6 proximate causation requirement.

7 Plaintiffs’ assertion that event attendance is “independent[]” from the pursuit
8 of the business opportunity (Opp. at 15) makes no sense. They allege that they
9 *invested* in events and propose a class of individuals who attended events “in pursuit
10 of Herbalife’s business opportunity.” Dkt. 202 at ¶ 195; *see id.* at ¶ 164 (“Peterson
11 convincingly claimed that the Herbalife business opportunity offered a certain path
12 to financial freedom for anyone willing to ***invest the time, money, and energy.***”) (emphasis
13 added), ¶ 221 (“Defendant and the Featured Speakers have collectively
14 persuaded tens of thousands of victims to ***invest substantial sums into attending***
15 ***events*** which are held out as the secret to becoming financially successful in a
16 fraudulent scheme to which Defendants know financial success is not possible.”) (emphasis
17 added).¹¹ Herbalife is not “mutat[ing]” Plaintiffs’ allegations. Opp. at
18 15. It is Plaintiffs who are running away from the essential nature of their
19 allegations in order to avoid dismissal of their RICO claims.

20 Plaintiffs’ attempts to distinguish *Trump* fail. It does not matter that the
21 defendants there were alleged to have promoted third-party companies. That was
22 not a basis for the Court’s holding (and in any case, Herbalife also is alleged to have

23
24 Opp. at 11. The Amended Complaint alleges new predicate offenses against
25 Herbalife, none of which, as noted above, proximately caused Plaintiffs’ losses.
26 Further, the *Trump* case was decided after briefing was complete in connection with
27 Herbalife’s motion to dismiss the original complaint. Soon after the *Trump* decision
Dkt. 183.

28 ¹¹ *Takeda* also is distinguishable because it did not involve plaintiffs who invested
in their own businesses.

1 promoted events run by third parties, *see* Mtn. at 11-12). Additionally, that
2 Plaintiffs seek only the money they spent in connection with events does not save
3 their RICO claims. Those admitted *investments* cannot be viewed in a vacuum,
4 separate and apart from Plaintiffs' overall pursuit of the business opportunity.

5 **C. Plaintiffs' State Law Claims Fail for the Same Reasons.**

6 Plaintiffs erroneously assert that their retention of only one corporate
7 defendant renders their negligent misrepresentation claim compliant with the
8 Court's Order and Rule 9(b). That claim is based on the same underlying fraud as
9 Plaintiffs' RICO claims, and is not pled with specificity for the reasons noted above.
10 Nor do Plaintiffs address their lack of actual reliance on any statements made by
11 Herbalife. Mtn. at 18.

12 As to their UCL claim, Plaintiffs respond by referencing a handful of
13 statements allegedly made by Featured Speakers, not Herbalife. Opp. at 17.
14 Further, there is no allegation that (1) any of these speakers achieved success
15 through illegitimate means or (2) Herbalife was aware of any relevant misconduct
16 on the part of these speakers at the time of the events in question. Without those
17 predicate allegations, there can be no inference that Herbalife violated the UCL.

18 **III. CONCLUSION**

19 Herbalife respectfully urges the Court to dismiss Plaintiffs' Amended
20 Complaint with prejudice. Retaining only one defendant is not a "good faith
21 attempt" to comply with the Court's Order. Opp. at 18. Nor do the Amended
22 Complaint's additional allegations bring it into compliance with Rule 9(b). Further,
23 the supposed lack of certain discovery is not an excuse for a failure in pleading that
24 should have been addressed when the complaint was filed over two years ago.¹²

25
26 ¹² Plaintiffs are wrong to assert that Herbalife has not been forthcoming in
27 discovery. Opp. at 18-19. Plaintiffs have filed one motion to compel to date. In
28 connection with that motion, Judge Wilner ordered narrow relief and did not award
Plaintiffs their attorneys' fees. Dkt. 203 at ¶ 25 (acknowledging that the parties
have a "legitimate beef about the scope of discovery in this action").

1 DATED: January 6, 2020

Respectfully submitted,

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